SUPREME COURT OF THE UNITED STATES.

No. 57.

THE MAYOR AND ALDERMEN OF THE CITY OF MOBILE, PLAINTIFFS IN ERROR,

vs.

MIGUEL D. ESLAVA.

IN ERROR TO THE SUPREME COURT OF ALABAMA.

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S. D. Langtree, Print.

UNITED STATES OF AMERICA, *ss.*

The President of the United States, to the Honorable the Judges of the Supreme Court of the State of Alabama, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, being the highest court of law or equity of the said State, in which a decision could be had in the said suit between the Mayor and Aldermen of the city of Mobile, plaintiffs in said supreme court, and Miguel D. Eslava, defendant in said supreme court, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such, their validity; or wherein was drawn in question the construction of a clause of the constitution, or of a treaty or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Mayor and Aldermen of the city of Mobile, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of January next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Roger B. Taney, Chief Justice of the
[L. S.] said Supreme Court, this twenty-first day of October, in the year of our Lord one thousand eight hundred and forty.

Allowed by HENRY W. COLLIER,
Chief Justice of the Supreme Court of Ala.

[REC. LVII. J. T. 1841.]—1

Writ of Error.

The MAYOR and ALDERMEN of the city of Mobile } (3026. 1278.)
vs. } Pleas, &c.
MIGUEL D. ESLAVA. }

Be it remembered, that heretofore, to wit, on the 2d day of July, 1838, were filed in the clerk's office of this court, a writ of error and transcript of record, in the following words and figures, to wit:

The State of Alabama, to the clerk of the circuit court for Mobile county, greeting:

Because, in the record and proceedings, and also in the giving of judgment, in a cause which was in our said circuit court, by our writ of capias ad respondendum, between the Mayor and Aldermen of the city of Mobile, plaintiffs, and Miguel D. Eslava, defendant, of a plea of trespass to try titles, manifest error hath intervened to the great damage of the said Mayor and Aldermen, as by their complaint we are informed. We being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice done to the parties in this behalf, do command you, that if judgment be thereupon given, then you send to our judges of the supreme court, distinctly and openly, under your hand and seal, the record and proceedings of the cause aforesaid, with all things concerning the same, and this writ, so that they may have them before the supreme court at the first Monday in June; that the record and proceedings aforesaid being inspected, we may cause further to be done thereupon, for correcting that error, what of right, and according to law, ought to be done.

Witness Malcolm J. McRae, clerk of our circuit court for Mobile county, this 27th day of March, in the year 1838.

Issued this 27th day of March, 1838.

Attest: M. J. McRAE, *Clerk.*

Capias ad Respondendum.

MAYOR and ALDERMEN of the city of Mobile }
vs. }
MIGUEL D. ESLAVA. }

Pleas before the honorable Ezekiel Pickens, presiding judge of the circuit court of Mobile county, at a court begun and held in and for said county of Mobile, at the court house thereof, on the second Monday after the fourth Monday of October, in the year 1837.

Be it remembered, that heretofore, to wit, on the 8th day of July, (1835,) in the year of our Lord one thousand eight hundred

and thirty-five, came the Mayor and Aldermen of the city of Mobile, by their attorney, and sued out of the office of the circuit court of Mobile county, a writ of capias ad respondendum against Miguel D. Eslava; which writ, with the endorsement and return thereon made, is in the words and figures following, to wit:

The State of Alabama, to the Sheriff of Mobile county, greeting:

You are hereby commanded to take Miguel D. Eslava, if to be found in your county, and him safely keep, so that you may have him before the honorable the circuit court to be holden for Mobile county, at the place of holding said court, on the first Monday after the fourth Monday in October next, to answer to the Mayor and Aldermen of the city of Mobile in a plea of trespass to try titles, to their damage ten thousand dollars. Herein fail not; and have you then there this writ.

Witness Joseph Bates, Jr., clerk of the said court, this eighth day of July, in the year of our Lord one thousand eight hundred and thirty-five.

Issued this eighth day of July, in the year 1835.

JOSEPH BATES, Jr., *Clerk.*

Cause of Action.

This action is brought to try titles, and recover possession and damages for the detention of a certain tract or parcel of land in the city of Mobile, bounded on the north by land now, or lately, in the possession of Thomas Terry; east by Commerce street; south by Church street; and on the west by Water street; and extending from the east side of Commerce street to the channel of the river.

Attest:

WILLIAM HALE.
ISAAC H. ERWIN.
Attorneys for Plaintiffs.

Received and executed 11th July, 1835.

T. L. TOULIUM,
Sheriff Mobile County, by
WM. MAGEE,
Sheriff's Deputy.

Declaration.

And afterwards, the plaintiffs, by their attorneys, filed their declaration against the defendant, which is in the words and figures following, to wit:

STATE OF ALABAMA, *Mobile County,*
The Circuit Court, Fall Term, 1835.

The Mayor and Aldermen of the city of Mobile, by attorneys, complains of Miguel D. Eslava of a plea of trespass, with force and

arms, &c., to try titles; for that the said defendant, on the sixth day of July, A. D. 1836, at the county aforesaid, broke and entered into a certain lot or tract of land situate in said county, the property and close of plaintiff, known as a lot of land in the city of Mobile and county aforesaid, bounded on the north by land now, or lately, in the possession of Thomas Terry; east by Commerce street; south by Church street; and on the west by Water street; and extending from the east side of Commerce street to the channel of the river; and then and there ejected, put out, and expelled the said Mayor and Aldermen from the possession of the same, and kept, and continues them so ejected and expelled for a large space of time, to wit, from thence hitherto, whereby the said plaintiffs for and during all this time, have been deprived of the use and benefit of said land, &c., to wit, at the county aforesaid, to the damage of said plaintiffs of ten thousand dollars.

WILLIAM HALE,
Plaintiffs' Attorney.

Plea.

And the said defendant, by attorney, comes and defends the force, &c., and says that he is not guilty in manner and form as the said plaintiffs has alleged; and of this he puts himself upon the country.

GORDON, CAMPBELL, & CHANDLER,
Defendant's Attorneys.

Judgment.

And now, at this day, to wit, at a circuit court begun and held in and for the county of Mobile, at the court house thereof, on the second Monday after the fourth Monday of October, in the year of our Lord one thousand eight hundred and thirty-seven, being the day and year first herein written, the following judgment was rendered in said cause, to wit:

The Mayor and Aldermen of the city of Mobile	}	Plaintiffs.
vs.		
Miguel D. Eslava	}	Defendant.

This day came the parties by their attorneys, and thereupon came a jury, to wit, Henry A. Barclay and eleven others, good and lawful men, who, being duly sworn, tried and elected, upon their oaths do say, "We, the jury, find the defendant not guilty." It is therefore considered by the court that the plaintiffs take nothing by their action; and that the defendant recover of the plaintiffs his costs by him, about his defence in this behalf, expended.

Bill of Exceptions.

MOBILE CIRCUIT COURT, *Fall Term*, 1837,
Before the honorable Ezekiel Pickens, Circuit Judge.

THE MAYOR and ALDERMEN of the City of Mobile
vs.
CHARLES S. MATTHEWS Tenant, MIGUEL D. ESLAVA.

This was an action of trespass to try title to land. It was brought to recover certain lots in the city of Mobile, bounded on the north by lands now or lately in possession of Thomas Terry, east by Commerce street, south by Church street, and on the west by Water street, and extending on the east side of Commerce street, in said city, to the channel of the river. It was proven, among other things, that the tenant of the defendant was in possession when the writ was issued and served, and that defendant was, by rule of court, permitted to defend, instead of his lessee, the tenant in possession. The particular location of the lots in dispute was established by the following facts which were proved. By an act of Congress, passed in the year 1818, the President of the United States was authorized to cause the lots of ground whereon Fort Charlotte, in the town of Mobile, to be surveyed and laid off into lots with suitable streets and avenues, conforming as nearly as may be to the original plan of the town aforesaid; and when the survey was completed, one part plat thereof should be returned to the Secretary of the Treasury, and another to such officer or agent as the President shall have authorized to dispose of said lots; and the said lots of ground should be offered at public sale, in the town of Mobile, in the same manner and on the same terms and conditions of credit as is provided for the sale of the public lands. In pursuance of the provisions of the act of Congress, a survey was made by Silas Dinsmore, and approved by the surveyor general of the United States, the plats made, and of them, returned to the Secretary of the Treasury. A copy thereof was shewn forth in evidence legally authenticated, and is annexed and made a part of the case. The site of Fort Charlotte was laid off into ten squares and parts of squares, which were subdivided into lots of , and streets were laid off running over the ground forming the site of said fort, conforming as near as may be to the original plan of the town of Mobile. By the original plan of the town, a street, known as Water street, was run on the margin of the Mobile river, continuous with and immediately fronting on the same. By the survey of Mr. Dinsmore, as is proved from the plat aforesaid, Water street was laid off and extended over a part of the site of Fort Charlotte, to conform as near as may be to the original plan of the town. This street was laid off on the margin of the river contained within the limits of the fort, continuous with and immediately fronting the same, the river lying eastwardly of the street which runs nearly north and south. Another street, known as Church street,

was also laid off over the site of the fort, to conform as near as may be to the original plan of the town, it being the street known in said plan by that name, extended over the grounds of the former fort to Water street in a direction nearly eastwardly, so that Water street and Church street meet at nearly right angles at the margin of the river and within the boundary of the former Fort Charlotte. The lots were sold by the United States agreeably to the plat aforesaid; none were laid off, nor were any sold by the United States, to the east of Water street. Lots designated on Dinsmore's plat as number 10, 11, 12 and 13, in square 1, lay immediately west of Water street, and fronting on that street to the east. Under the Spanish Government, and whilst the United States held possession of Fort Charlotte, there was an open and unobstructed space from high water mark on the river to the channel, except a wharf running into the river and used for the commerce of the fort.

The lots now in dispute are situate and being on the east side of Water street, directly opposite, the lots number 10, 11, 12 and 13, being on the west side of said street, running eastwardly across Commerce street and into the river. The lots number 10, 11, 12 and 13 are situate on the site of the former Fort Charlotte; and the lots in dispute are situate on the open space between high and low water mark, in front of the fort and between it and the river, and within the boundary of the picket fence that formerly surrounded the fort. The sale of the lots of Fort Charlotte by the United States took place on the , 1820, and were purchased by a company known as the Lot Company of Mobile. The company caused another survey to be made of the premises by Mr. Hibborn, including a larger quantity of ground than was embraced in the survey and plat of Dinsmore; they altered the position of Church street by placing that part of it adjoining Water street about thirty feet south of where Dinsmore had located it. Water street was continued in the same place, and was represented as sixty feet wide. The streets as laid off by Dinsmore, and altered by the lot company, have since that time and are now recognized as the true streets of the city. The lot company made a resale on the day of , 1822. It appeared that there is a regular oceanic tide in the river Mobile, the flow and ebb of which vary about 18 inches or two feet. In 1822 Water street and the property now in dispute were between high and low water mark. In 1823 the corporation of the city of Mobile appropriated and expended four hundred dollars in filling up of Water street between Church and Government streets, and by the improvement confined the water at high tide to the eastern edge of Water street. The lots now sued for, running from Water to Commerce street, and the space now forming that street to the eastward, was between high and low water mark. There was no evidence offered to prove the lots, known under the Spanish Government as water lots, whereon improvements had been made.

The plaintiffs read to the jury, as evidence of title, an act of

Congress entitled "An act granting certain lots of ground to the corporation of the city of Mobile and to certain individuals of said city," passed 20th May, 1824.

The defendants then read the act of Congress authorizing the sale of Fort Charlotte. The patents from the United States to Wm. Barrutt, John B. Hogan, Francis W. Armstrong, Edward Hall, Addin Lewis, to each of the plats nearest the water, which were surveyed by the United States on the site of Fort Charlotte. These patents recite that those parties were the purchasers at the sale of the lots, that they had made full payment therefor, and grants the said several lots; these patents bear date October 1st, 1821.

The defendants then produced deeds from the said parties to him, for a portion of the land sued for, dated in 1822, and for another port ionto Addin Lewis in 1822, and from Addin Lewis to him; the map, Dinsmore the surveyor, is attached. The property is in ~~part~~ of lots 10, 11, 12, 13, 14, & 15, in square 1, on that map; at the date of that map it was in evidence that the lines of the aforesaid lots were below the lines of high water mark. One of the witnesses testified that in order to reclaim one of the lots in square 2, he had to fill up seven feet, and that he could not pass along Water street at that time, except with the aid of logs and timbers. Another witness testified that he purchased the lot right west of the lots aforesaid; that he had to fill up his lot before it could be employed. And other evidence was given by defendant, conducing to prove that the eastern lines of the lots at the date of the sale was below high water mark. It was further in evidence on the part of the defendants that the company aforesaid, after purchase of the lots from the government, expended about $3,000 for the common benefit of their property, and to keep the water from it. It was further in evidence on the part of the defendant that shortly after the purchase of the lots in controversy, by Addin Lewis, he caused dirt to be hauled upon it, and that he rented his to one Cox, who placed timbers down in order to force out the water and fit it for a timber yard; this was in 1822 or '3. It was further in evidence that Charles Matthews, in 1823 or 1824, expended $1000 in filling up his lot. And with the view of showing improvements before 1824, they read from the book of the corporation, the following minute, dated in 1823: "Charles S. Matthews having improved his lot by filling it up, and a stagnant pond being occasioned thereby at the end of Church street, &c." It was further in evidence that in 1824, about one half the space between Water street and Commerce street, was subject to be covered by water at the ordinary tides. All the witnesses concur in stating that the eastern boundary of the lots nearest the water was about the western line of Water street. *The* one of the witnesses stated that the stakes run to the east of Water street, so that a portion of their property sued for would be within the staked lines of the lots sold. It was in

evidence that Water street was not open as low as Church street till 1824, which was done by act of the corporation.

The defendants further offered evidence to prove that in 1823 and for every year since till 1836, except (4 years at intervals, about which no evidence was given) that he or they under whom he claimed had paid taxes on the property to the corporation upon the assessments of its officers. They offered evidence to prove that in 1824 or '5, he had been required to pay for side walks around it, upon the assessments of the corporation; that in 1833 he had been required to fill two places upon it with earth or shells by the mayor of the city. That about the same time it was advertised for sale as the property of the defendant, for unpaid taxes assessed against him, and that the corporation had afterwards received the amount thereof, and the expenses of the advertisements.

Upon which the judge charged the jury as follows, that if the lots specified in the patents 10, 11, 12, &c., were proved to have been bounded by high water mark at the time purchased; then they came within the terms of "lots known under the Spanish Government as water lots, as used in the act of Congress," and if proved that the lot claimed was east of Water street, and in front of the lots covered by the patents, and that had been improved before the passage of the act, it was vested in the proprietors and occupants of the lots held under the patents, and this although Water street did intervene between the lots claimed and those held under the patents.

The proof showed that property to have been assessed in 1823, by the city authorities at $4,000, and recently at $88,000, and improved value resulting from the labor of Charles Matthews. And the jury were charged that if the proof satisfied them that in August 1823, the Mayor and Aldermen, in reference to this lot, had on their minutes used this language, viz: Whereas Charles Matthews "has commenced to improve his lot by filling up" &c.; and that a committee was organized to enquire into a nuisance connected with the lot, and that in 1824, and for 4 or 5 of the years between that and the commencement of the suit, the city taxes had been assessed on this property and collected from Matthews, and that Matthews in 1824 or '5, had been required by an ordinance of the Mayor and Alderman to make side walks along this lot, and had so done; and that Matthews had, by a written notice issued by the mayor, been required to fill up some low places on said lot to abate a nuisance thereon, and that this property was advertised for sale as the property of Matthews, in one of the city papers for the non-payment of city taxes assessed thereon, and that subsequently Matthews had paid such taxes, and the expenses of the advertisement, into the city treasury; then such facts would estop the plaintiff to assert any pre-existing title they may have had under the act of Congress if any.

The plaintiffs' counsel requested the judge to charge the jury, that if they believed the facts were proven as contended for by them, that the plaintiffs were entitled to a verdict in their favor, which instruction the judge declined to give.

To all which charges and refusals to charge, the counsel of the plaintiff excepted, and asks this signed as a bill of exceptions which is sealed.

EZEKIEL PICKENS, [L. S.]

Extract from the map in the general land office of the town of Mobile, exhibiting the public lot on which Fort Charlotte stands, also the adjacent ground laid out into squares and lots in conformity with the original plan of the town, by Silas Dinsmore, deputy surveyor.

Explanations of the map: the squares shaded green, represents the public lot; the red shades bounds the public lots; the subdivisions of the squares into lots for sale are represented by dotted lines. The streets in the new survey are laid off 60 French feet wide, the lots are 30 French feet wide; the French foot is = to $12\frac{789}{1000}$ inches American measure.

THE STATE OF ALABAMA, *Mobile County.*

I, Malcolm J. McRae, clerk of the circuit court for Mobile county, in the State aforesaid, do hereby certify that the foregoing eleven pages contains a true copy from the record and proceedings in the case of the Mayor and Aldermen of the city of Mobile, plaintiffs, and Miguel D. Eslava, defendant, as the same remain on file in my office.

In testimony whereof, I hereunto set my hand and cause the seal of said circuit court to be hereto affixed, this (11th) [L. S.] eleventh day of May, in the year of our Lord one thousand eight hundred and thirty-eight.

Attest: M. J. McRAE, *Clerk.*

Upon which writ of error and transcript of record, proceedings were had in the supreme court as follow, to wit:

STATE OF ALABAMA, *Supreme Court of the State of Alabama, of June term, in the year* 1838.

MAYOR and ALDERMEN of the city of Mobile
vs.
MIGUEL D. ESLAVA.

And now come into the said court the said plaintiffs by William Hale, their attorney, and say that there is error in the said record

in this, that the charge of the judge on the trial of the said cause is against law.

And that there is also error in this, that the charge of the said judge denies that the United States had power to grant the premises in question. And that there is also error in this, that the said charge of the said judge maintains that the title to the premises in question is in said defendant.

WILLIAM HALE,
Att'y for Def't and of Counsel.

There is no error in the record.

G. W. STEWART,
Att'y for Def't in Error.

At June term 1838, this cause was continued. And now at this day, to wit, at January term 1839, and on the 8th day of February, 1839.

Present the honorable Henry W. Collier, chief justice, John J. Ormond judge, Judge Goldthwaite, judge, the following order was made:

Because the court would further consider of the matters of law arising in these cases, day is given said parties until the next term of this court.

At January term 1839, this cause was continued; and now at this day, to wit, at June term 1839, and on the first day of July, 1839.

Present, the honorable Henry W. Collier, chief justice, and John J. Ormond, judge.

This day again came said parties, and the record in this cause and matters assigned for error therein, being by the court fully examined and mature deliberation thereon had, it seems to the court that in the record and proceedings of said circuit court there is no error. It is therefor considered that said judgment be affirmed, that the said Miguel D. Eslava, recover of the said Mayor and Aldermen of the city of Mobile, the costs of this cause in this court and in said circuit court.

Know all men by these presents, that we, the Mayor and Aldermen of the city of Mobile, and R. C. McAlpin, are held and firmly bound unto Miguel D. Eslava, in the full and just sum of two hundred dollars, to be paid to the said Miguel D. Eslava, his certain attorney, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this 21st day of October, in the year of our Lord one thousand eight hundred and forty.

Whereas, lately at a supreme court of the State of Alabama, in a suit pending in said court between the Mayor and Aldermen of the city of Mobile, plaintiffs in said supreme court, and Miguel D. Eslava, defendant in said supreme court, judgment was rendered against the said Mayor and Aldermen of the city of Mobile; and

the said Mayor and Aldermen of the city of Mobile, having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Miguel D. Eslava, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, the second Monday of January next, in the year 1841. Now the condition of the above obligation is such, that if the said Mayor and Aldermen of the city of Mobile shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

Mayor and Aldermen of the city of Mobile, by
R. C. McALPIN, *Att'y.* [L. S.]
R. C. McALPIN. [L. S.]

Approved by HENRY W. COLLINS,
Chief Justice of the Supreme Court of Alabama.

I, James B. Wallace, clerk of the supreme court of the State of Alabama, do hereby certify that the foregoing sheets, from page three, to page sixteen, contains a full and complete transcript of the record and proceedings and final judgment in the case of the Mayor and Aldermen of the city of Mobile, against Miguel D. Eslava, decided in said supreme court at the June term 1839, of said court, as also a copy of the bond for the writ of error sued out in said cause, to the Supreme Court of the United States.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, this 21st day of October, 1840.
[L. S.]

JAMES B. WALLACE,
Clerk of the Supreme Court of the State of Alabama.

Appendix to No. ~~35.~~ 26

THE MAYOR AND ALDERMAN of the City of MOBILE,
vs.
MIGUEL D. ESLAVA.

Copy of opinion delivered on the day of June, 1839, by Chief Justice Collier.

The plaintiffs in error brought an action of trespass against the defendant in the circuit court of Mobile, to try the title to, and recover the possession of a certain lot or tract of land situate in the city of Mobile. On the trial the presiding judge sealed and certified a bill of exceptions, from which among other things it appears that "By an act of Congress passed in the year 1818," the President was authorized, to cause the ground whereon Fort Charlotte in the town of Mobile, was then situated, to be laid off into lots, with suitable streets and avenues, conforming as near as might be to the original plan of that town; when the survey was completed, one plat thereof was directed by the act to be returned to the Secretary of the Treasury; and another to such officer or agent as the President should authorise to dispose of the lots thus surveyed; and the lots were required to be offered at public sale in the town of Mobile, in the same manner and on the same terms as was provided on the sale of the public lands. Pursuant to the provisions of this act of Congress, a survey was made by Silas Dinsmore, and approved by the Surveyor General of the United States, the plats made out and one of them returned to the Secretary of the Treasury. The site of Fort Charlotte was laid off into ten squares and parts of squares, all of which were sub-divided into lots, and streets were laid off over the ground on which the fort was situated; conforming as near as practicable to the original plan of the town. By the original plan of the town, a street known as Water street was run on the margin of the Mobile river, continuous with, and immediately fronting on the same. By the survey of Mr. Dinsmore, Water street was extended over a part of the site of the fort, conforming in width and course to its original location. This street was laid off in the margin of the river, contained within the limits of the fort, and running nearly north and south with the river, on its eastern side.

Another street known as Church street, was extended over the site of the fort, from the west to Water street on the east, in conformity to the original plan of the town, so that Church and Water streets met each other at near right angles, at the margin of the river, and within the limits of the fort.

The lots were sold by the United States agreeably to the plat returned to the Secretary of the Treasury, and none were either laid off or sold to the east of Water street.

The lot now in controversy is situated on the east side of Water street directly in front of the lots 10, 11, 12 and 13 in square 1, (as designated in the survey of Mr. Dinsmore) and runs eastwardly across Commerce street into the river. The lots number 10, 11, 12 and 13, are situate on the site of Fort Charlotte, and the lot in dispute is situated on the open space between high and low water mark in front of the fort, and between it and the river and within the limits of the picket-fence that once surrounded the fort. The sale of the Fort Charlotte lots took place on the day of , 1820, and were purchased by a company known as the lot company of Mobile. The company caused another survey of the premises by Mr. Hubborn, including a larger quantity of ground than was embraced in the survey and plat of Dinsmore;—they altered the position of Church street by placing that part of it adjoining Water street about thirty feet south of where Dinsmore had located it. Water street was continued in the same place, and was represented as sixty feet wide. The streets laid off by Dinsmore, as altered by the lot company, have since that time been recognised as the proper streets of the city. On the day of , 1822, the lot company made a sale of the Fort Charlotte lots.

It was shown by the proof that there is a regular oceanic tide in the river Mobile, the flow and ebb of which vary about eighteen inches or two feet. In 1822 Water street and the property now in dispute were between high and low water mark; in 1823 the corporation of the city of Mobile appropriated and expended four hundred dollars in filling up of Water street, between Church and Government streets, and by the improvement confined the water at high tide to the eastern edge of Water street. The lot in controversy from Water to Commerce streets, and the ground now forming the latter street on the east, was between high and low water marks. No evidence was offered to show that the lots on the site of Fort Charlotte immediately west of the property claimed by the plffs. were known under the Spanish government as water lots whereon improvements had been made.

The plaintiffs read to the jury as evidence of title an act of Congress, entitled "An act granting certain lots of ground to the corporation of the city of Mobile, and to certain individuals of said city," passed 20th May, 1824.

The defendant on his part, then read to the jury the act of Congress authorising the sale of Fort Charlotte; the patents from the

United States to William Barnette, John B. Hogan, Francis W. Armstrong, Edward Hall and Addin Lewis to each of the lots nearest the water, which were surveyed under the authority of the United States, on the site of Fort Charlotte. These patents recite that, the grantees were the purchasers at the government sale of the lots, and had made full payment therefor; in consideration of all which the United States conveys the title to the grantees.

The defendant then gave in evidence, deeds from the grantees to Charles Matthews, for a portion of the land sued for, and for another portion to Addin Lewis, and from Addin Lewis to Charles Matthews; all these deeds were dated in 1822, a period subsequent to the issuance of the patents.

The premises in question is in front of lots 10, 11, 12, 13, 14 and 15 in square 1. At the time of Dinsmore's survey, it was in proof, that the eastern lines of these lots were below high water mark. One of the witnesses stated, that in order to reclaim one of the lots in square 2, he had to fill up seven feet, and that he could not pass along Water street at that time, without the aid of logs and timbers; "another witness testified that he purchased the lot right west of the lots aforesaid, that he had to fill up his lot before it could be employed; and other evidence was given by defendant, conducing to prove, that the eastern lines of the lots at the date of the sale was below high water mark." It was further shewn by the defendant, that the lot company after their purchase, expended about three thousand dollars in the improvement of their property, and to exclude the water from it. And that shortly after the purchase of the premises in dispute by Addin Lewis, he caused dirt to be hauled upon it, and that he leased it to one Con, who laid down timbers in order to force out the water, and fit it for a lumber yard —this took place in 1822 or 23.

It was also proved that Charles Matthews in 1823 or '24 expended one thousand dollars in filling up his lot; with the view of showing improvments previous to 1824, the defendant read from the book of the corporation the following minute dated in 1823: "Charles L. Matthews having improved his lot by filling it up, and a stagnant pond being occasioned thereby at the end of Church street, &c." In 1824 it appeared that about one half the space between Water and Commerce streets was subject to be covered by water at the ordinary tides.

All the witnesses stated that the eastern boundary of the lots on the site of Fort Charlotte was about the western line of Water street, as indicated by the stakes placed there.—It was in evidence that Water street was not opened as far south as Church street until 1824, when it was extended by an act of the corporation of the city of Mobile.

The defendant offered evidence to prove that in 1823 and for every since till 1836 (excepting intervals of four years about which no testimony was given), that he or they under whom he claimed, had paid taxes on the property in question to the corporation upou

the assessment of its officers. And further, that in 1824 or '5 Charles Matthews had been required to pay for side walks around it by the corporation; that the mayor of the city in 1833 required him to fill up the low places upon it with earth or shells. And that about the time last mentioned it was advertised for sale as the property of the defendant for unpaid taxes assessed upon it, which taxes together with the expences of the advertisement were afterwards paid to the corporation.

It further appears from the bill of exceptions that the defendant Miguel D. Eslava was in possession of the premises as the tenant of Charles L. Matthews at the commencement of the suit and service of the writ, and that Matthews was permitted to defend instead of his tenant by an order of the court.

We are further informed that it was agreed by the parties, that the map of the survey made by Dinsmore, should be made a part of the bill of exceptions, and in conformity to that agreement a copy of the map accompanies the record.

The presiding judge charged the jury as follows: "If the lots specified in the patents 10, 11, 12, &c. were proved to have been bounded by high water mark at the time purchased, then they came within the terms of lots known under the Spanish government as water lots "as used in the act of Congress, and if proved that the lot claimed was east of Water street, and in front of the lots covered by the patents, and that they had been improved before the passage of the act, it was vested in the proprietors and occupants of the lots held under the patents. And this although Water street did intervene between the lots claimed and those held under the patents."

The jury were further instructed, "that if the proof satisfied them that in August 1823 the mayor and aldermen in reference to this lot had on their minutes used this language, viz: "Whereas Charles Matthews has commenced to improve his lot by filling up, &c., and that a committee was organised to enquire into a nuisance connected with the lot, and that for 1824 and for 4 or 5 of the years between that and the commencement of the suit, the city taxes had been assessed on this property and collected from Matthews, and that Matthews in 1824 or '5 had been required by an ordinance of the mayor and aldermen to make side walks along this lot, and had so done, and that Matthews had by a written notice issued by the mayor, been required to fill up some low places on said lot to abate a nuisance thereon. And that this property was advertised for sale as the property of Matthews in one of the city papers for the non-payment of city taxes assessed thereon, and that subsequently Matthews had paid such taxes, and the expences of the advertisement into the city treasury, then such facts would estop the plaintiffs to assert any pre-existing title they may have had under the act of Congress if any.

The plaintiffs' counsel requested the judge to charge the jury, that if they believed the facts were proved as contended for by

them, that the plaintiffs were entitled to a verdict in their favour, which instruction the judge declined to give, "A verdict being found for defendant and judgment rendered in favour of Eslava, the plaintiffs have prosecuted a writ of error to this court.

Opinion.

It will be premised that the property in controversy is situated directly east of the site on which Fort Charlotte stood in the city of Mobile. The lots laid off on the *area* covered by the fort, at the time of their survey and sale extended east to the margin of the shore, and at some points even included a part of the shore. While still further east and immediately adjoining was laid down on the plat on the plat "Water street" then almost if not entirely unreclaimed. East of Water street and west of the channel of the river is situated the premises the title to which is now controverted.

The plaintiffs insist upon their right to recover, because of a dedication by the United States to the use of the city. Aud the plaintiffs and defendant respectively contend that the title of each is complete under an act of Congress, passed on the 26th May, 1824, "granting certain lots of ground to the corporation of the city of Mobile, and to certain individuals of said city."

By an act of Congress of the 20th of April, 1818, the President of the United States was authorised, whenever in his opinion it should be consistent with the public interest, to abandon the use of Fort Charlotte at Mobile, and to cause the lot of ground, whereon it then stood to be surveyed and laid of into lots with suitable streets and avenues conforming as near as practicable to the original plan of the town. The act further directs when the survey is completed one plat thereof shall be returned to the Secretary of the Treasury, and another to such officer or agent as the President shall have authorised to dispose of the lots; and the lots shall be offered at public sale at Mobile on such day as the President by his proclamation shall designate, in the same manner and on the same conditions and terms of credit, as is provided by law, for the sale of the public lands by the United States (6 vol. laws of the U. S.—1 vol. land laws *ed* 1838—303).

In obedience to this law a survey was made of the site of Fort Charlotte and the lots there laid off were sold in 1820, and the landlord of the defendant, because the proprietor under a conveyance from the purchasers at that sale of the lots lying west of the property now sought to be recovered.

The defendant does not rely upon his reparian proprietorship as entitleing him to the land east of Water street, nor indeed could he insist on it with success, as the Fort Charlotte lots were not bouned by the river, but had other fixed metes and bounds.

The act of Congress of 1824, on which the parties mainly rest their pretensions, enacts, 1. "That all the right and claim of the United States to the lots known as the hospital and bakehouse lots, containing about three-fourths of an acre of land, in the city of Mobile, in the State of Alabama, and also all the right and claim of the United States to all the lots not sold or confirmed to individuals, either by this or any former act, and to which no equitable title exists in favor of any individual, under this or any former act, between high water mark and the channel of the river, and between Church street and North boundary street, in front of the said city, be, and the same are hereby vested in the mayor and aldermen of the said city of Mobile, for the time being, and their successors in office, for the sole use and benefit of the said city forever.

2. "That all the right and claim of the United States to so many of the lots of ground east of Water street, and between Church street and North boundary street, now known as water lots, as are situated between the channel of the river and the front of the lots known under the Spanish government as water lots, in the said city of Mobile, whereon improvements have been made, be, and the same are hereby vested in the several proprietors and occupants of each of the lots heretofore fronting on the river Mobile, except in cases where such proprietor or occupant has alienated his right to any such lot now designated as a water lot, or the Spanish government has made a new grant or order of survey for the same during the time at which they had the power to grant the same; in which case the rights and claims of the United States shall be, and is hereby vested in the person to whom such alienation, grant, or order of survey was made, or in his legal representative.

"Provided, that nothing in this act contained shall be construed to affect the claim or claims, if any such there be, of any individual or individuals, or of any body politic or corporate," (7 vol. Laws of the United States, 318)—1 vol. Land Laws *ed* 1838, 398.

Though the city of Mobile existed, as a town, long anterior to the treaties of St. Ildefonso and Paris, yet, even since the latter period, extensive reclamations have been made of the shore of the river, which bounds it on the east, as well by alluvien as by the employment of artificial agents. In this way several streets have been added, in the eastern part of the city, running north and south, so that at this time the principal seat of commercial business is on ground rescued from a bed of water since the Spanish authorities yielded the possession to the United States. Among these new streets is Water street. In 1824, it was, probably, the most eastern street throughout the entire front of the city; at any rate, there was none east of it in front of Fort Charlotte.

(*Argument of Defendant's Counsel.*)

Waiving a particular examination of the act of 1824, we proceed to consider an argument made for the defendant, which, if well founded, will render unnecessary an analysis of the act.

It was argued for the defendant that, even if the act of 1824, according to a just interpretation of its terms, conferred upon the plaintiffs the interest of the United States in the property in question, yet the act was wholly inoperative, because no title was vested in the United States which could be granted by Congress. That the act of 1819, to enable the people of the Alabama territory to form a constitution for the purpose of admission into the Union, on an equal footing with the original States, dedicated in express terms, to the free use of the citizens of this State and the United States the navigable waters within the limits of the former. That this dedication embraced so much of the soil as was covered by water, not only at low, but at high tide, so as to place it beyond the just powers of the federal government to grant the same.—1 vol. Land Laws *ed* of 1838, 310—Toulmius Ala. deg. 913.

And further, that as the sovereign power of a State is the proprietor of the tide waters in trust for the public, it is incompetent, even by an act of legislation, to grant the space intervening between high and low water marks.

One of the learned counsel for the defendant, supposing the case of Hogan *et al. vs.* Campbell *et al.* (8 Porter, Rep. 9) to be a decision adverse to the latter argument, has insisted that it is opposed by the best authority, and should be overruled by the court. Before we consider the first argument, we will briefly review the case of Hogan *et al. vs.* Campbell *et al.*, so far as it has been drawn in question. We do not propose to consider the general power of the sovereign over the tide waters, because such an inquiry is wholly unnecessary; but we will undertake to show that the conclusion of the court, in the case referred to, is defensible both in principle and upon authority, whether the rule of decision is drawn from the English common law or the laws and usages of Spain.

According to the common law, not only the dominion over the sea adjoining the coasts, and over arms of the sea and navigable rivers, but the right of property in the soil thereof, is also vested in the king. This proceeds from the policy of the common law to assign to every thing capable of occupancy or susceptible of ownership, a legal and certain proprietor. Notwithstanding the property in the tide waters is vested in the sovereign to high water mark, yet the people are entitled to their use for the purpose of navigation and fishing. Thus far the king may be regarded as a trustee for the public, and upon principle it would seem might make such disposition of the soil as would not impair or destroy the public right.

The king may grant the soil of tide waters to an individual, yet the grantee cannot so exercise his right of property as to injure the paramount right of navigation. The interest of the grantee has been aptly compared to that of a person who owns the fee simple of a road, who, when the road is discontinued, may appropriate the ground to his own purposes; but until then he cannot obstruct its passage. Lord Hale says, that the *jus privatum* of the proprietor is subject to the *jus publicum* of the community. How far the grantee of the soil may make reclamations, so that he does not disturb navigation, is an interesting question about which there is a want of entire harmony in the *dicta* and decisions on this branch of the law.

All, however, agree that as the shore becomes derelict by the receding of the waters, he may appropriate it to private purposes. (Angell on tide waters, 29, 33, 34, 135 to 143. Rex *vs.* Lord Grosvenor *et al.* 2, Starkee Rep. 510. Bandell *vs.* Catterall, 5. Barn & Ald, R. 91. Harg Tracts, 32. The Attorney General *vs.* Richardson, 1 Anstruthers, R. 603.)

In Hogan et al., vs. Campbell et al., the confirmatory grant made by the authorities of Spain, extended the title of the grantees across the shore to the channel of the river. According to the common law, such grant was unobjectionable; it neither expressly or impliedly authorised any interference with the public right of navigation, nor did it appear that it had produced such a result.

But if had been attempted to be made the instrument of injury to the public, the grant would not thereby have been rendered void; the preventive power of the law, by its interposition, might have restrained it to a legitimate purpose. For any thing disclosed by the record in that case, it may have been the intention to convey a title to the soil without confering an authority to occupy it until it had ceased to be covered by the water; nor did it appear that it was occupied at an earlier period. It it is then clear, that the grant, on its face, if tested by the rules of the common law, is valid.

We will now consider the grant in reference to the laws and usages of Spain touching her colonial possessions. The power of Spain at the time its earliest establishments in America were made, had perhaps far outstripped any kingdom in Europe. Its monarchs having extended their powers far beyond the limits which once circumscribed the legal authority, were hardly subject to control in concerting or executing their measures. They acknowledged no constitutional restraint, but as independent masters of their own resolves, they issued the edicts requisite for moddling the government of the new colonies by a mere act of prerogative.

The early interposition of the Spanish crown, in order to regulate the policy and trade of its colonies, is a peculiarity which distinguishes their progress from that of the colonies of any other European nation.

The Portuguese, the English and French considered the advantages promised by the regions occupied by them in America as so remote and uncertain that their colonies were suffered to struggle through a hard infancy, almost without aid or protection from the parent state. But gold and silver, the first productions of the Spanish settlements in the new world, were more alluring, and immediately attracted the attention of their monarch. Though they had contributed little to the discovery, and almost nothing to the conquest of the new world, they instantly assumed the function of its legislatures; and having acquired a species of dominion formerly unknown, formed a plan for exercising it, to which nothing similar occurs in the history of human affairs.

It was a fundamental maxim of Spanish jurisprudence, with respect to America, to consider its acquisitions there as vested in the crown rather than the State. By the bulls of Alexander VI, on which, as its *magna carta*, Spain founded its right, all the regions which had been or should be discovered, were bestowed as a free gift upon Ferdinand and Isabella. They and their successors were uniformly held to be the universal proprietors of the vast territories acquired by conquest in the new world. From them all grants of lands flowed. It is true, that when towns were built and formed into bodies corporate, the citizens were allowed to elect their own magistrates, who were authorised to adopt measures for the regulation of their own interior commerce and police. But no political power originated from the people—all centered in the crown and the officers of its nomination. The viceroys, who represented the person of their sovereign, possessed his regal prerogatives within the precincts of their own governments in their utmost extent. Like him, they exercised supreme authority in every department of government, civil, military and criminal. And as their dominions were too extensive for their personal supervision, they, in turn, were represented by various orders of magistrates; some appointed by the king, others by the viceroys, all of whom were amenable to the jurisdiction of the latter, unless they were required to execute their duties without the limits of either of the viceroyalties. (Robinson's Am., 350—1—2, 2 vol.; Prescott's Ferdinand and Isabella, 172—173—174—486—493—494—495.)

Thus we discover that the Spanish monarch possessed an unlimited control over his American colonies, and that his viceroys and other subordinate officers, exercised an extensive power. That he and not the State was the proprietor of the territories thus acquired. Being vested with the property, surely it was competent for him to make such disposition of his foreign possessions, as caprice or a sense of justice might dictate. The canons of the civil law, or the legislative regulations of Spain, were not recognized by its monarch as operating to restrain him in making grants of land in the new world. And it must, therefore, be immaterial whether, according to the civil law, rivers, the sea and its shores are destined

by nature to the common use of man, and thus withdrawn from commerce.

The territory which had or should be discovered in America, being vested in the Spanish monarchs, it followed, that they might create a political power there, or retain the reigns of government in their own hands, and parcel out the lands to such individuals as they might, from time to time, select. And the power created might be invested with all the incidents of property in the tide waters of which the subject was susceptible, or the king might confer upon his grantee a proprietorship quite as ample.

It is no answer to this conclusion to say, that the right to the acquisitions of Spain, whether by conquest or discovery, vested in the State and not in the king; and that the bulls of Alexander VI, could not give to the title a different distinction. Soon after the return of Columbus to Spain, Ferdinand and Isabella applied to the court of Rome to comfirm them in the possession of their recent discoveries, and invest them with an extent of jurisdiction similar to that previously confered on the kings of Portugal.

It was an opinion, perhaps as ancient as the crusades, that the Pope, as the head of the church on earth, had competent authority to dispose of all countries inhabited by heathen nations, in favor of Christian potentates.

Although Ferdinand and Isabella do not seem to have been fully satisfied of this right, yet they were willing to acquiese in its assumption, from the conviction that the papal sanction would most effectually exclude the pretensions of all others, and especially their Portuguese rivals, (2 vol., Prescott's Ferdinand and Isabella, 172.)

This high power being accorded to the Pope, by the Catholic States of Europe, and especially by Spain, titles acquired upon the supposition that it was rightful, cannot now be disturbed; an acquiescence for centuries in its legitimacy, must be held to operate as an estopel.

Again, it has been held to be a legal presumption, "that public and responsible officers, claiming and exercising the right of disposing of the public domain, did it by the order and consent of the government, in whose name the acts were done," and consequently, grants by them of the pubic lands "by color or claim of public authority, are evidence thereof, until the contrary appears by the showing of those who opposed the title set up under it, and deny the power by which it is professed to be granted." True, "a grant is void unless the grantor has the power to make it; but it is not void because the grantee does not prove or produce it. The law supplies this proof by legal presumption, arising from the full, legal and complete execution of the official grant, under all the solemnities known or proved to exist, or to be required by the laws of the country where it was made, and the land is situated," (United States vs. Arredondo and others, 6 Peter's Rep., 727—8;

New Orleans vs. the United States, 10 Peter's Rep. 727—see also 9 Cranch, 99 and 5; Wheaton Rep. 303.)

As then in the absence of all proof, every proper intendment is to be made in favor of a grant bearing on its face the evidences of regularity and authenticity, we must suppose that the officer making it, was duly accredited by his government, and that he undertook to dispose of no more of the property of his sovereign than the laws of Spain authorized. We are now brought to consider whether the act of 1824 vested a title to the premises in dispute in the plaintiffs. And in entering upon the examination of this question, it may be well to premise that the act of Congress cannot be held to assert a title on the part of the United States, but is nothing more than a renunciation of whatever title the government may have, or be supposed to have had, to so much of the shore as is described in it.

The shore of the sea, and its arms is that space of land which is alternately covered, and left dry by the rising and falling of the tide, or in other words, that space of land which is between high and low water marks. It is this space to which the United States quit claim by the act of 1824. By the act of Congress of March 1803, "regulating the grants of land, and providing for the disposal of the lands of the United States, south of the State of Tennessee," it is enacted "that all navigable rivers within the territory of the United States, south of the State of Tennessee, shall be deemed to be and remain public highways," (1 vol. Land Laws, ed. 1838, p. 98, sec. 17.) And all the laws in regard to the establishment of territorial governments by Congress, and the survey and disposal of the public lands, whether of an earlier or later date contain similar provisions. (Ibid, pages 23, 56, 107, 195, 216, 365.)

The several acts of Congress regulating the survey of the public lands, all provide for surveys which border on navigable streams to be so made, as not to include within its lines, any part of the shore, (1 vol. Land Laws, ed. 1838, p. 50, 96, 104, 191.)

In the last proviso of the 6th section of the act of 1819, "to enable the people of the Alabama territory to form a constitution and state government, and for the admission of such State into the Union, on an equal footing with the original States;" among the propositions submitted by Congress to the convention for their acceptance or rejection, it is declared that all navigable waters within the said State shall forever remain public highways, free to the citizens of said State, and of the United States, without any tax, duty, import or toll therefor imposed by the State," (1 vol. Land Laws, ed. 1838, 310.) By the ordinance which makes a part of the constitution of Alabama, the convention for and in behalf of the people inhabiting this State, do accept the propositions offered by the act of Congress, under which they are assembled.

The act of Congress of 1819, seems to suppose that by the admission of Alabama into the Union, the jurisdiction of the State over its navigable waters might have been exercised, so as to exclude

from their navigation the citizens of the United States, or else the proposition we are considering was inserted *ex majore cautela*, that collision between State and Federal jurisdiction might be avoided. But it is perhaps needless to enquire under what influence it may have been made a matter of stipulation.

We find it also enacted in the territorial ordinance, and the laws the survey and sale of lands in Mississippi and Alabama that the "navigable waters shall be and remain public highways." Here were express avowals by Congress that they should not be surveyed and sold, but should be withdrawn from commerce.

For what purpose were such avowals made ? Was it in the first instance to prevent the local legislation from authorising an obstruction of the navigation of the waters within the territory, or was it intended in the last instance to furnish a pledge to those who might purchase lands of the United States that the navigable waters should remain common property, free to the use of all ? If the latter, was the object proposed, it would not have been consistent with good faith for Congress to make a grant of the navigable waters by making that private property, which before was dedicated to the common use of all men.

Without speculating further upon the intention of Congress to be gathered from its enactments previous to 1819, we think it sufficiently appears from the act of that year, authorising the formation of a state constitution, that the United States proposed to relinquish its right to the "navigable waters" without this state upon an agreement by the convention that they should "forever remain publick highways, free to the citizens of said State, and of the United States, without any tax, duty, impost, or toll therefor imposed by the said State." The proposition for that purpose is thus introduced by Congress, "sec. 6 : That the following be and the same are hereby offered to the convention of the said territory of Alabama, when formed, for their free acceptance or rejection, which if accepted by the convention shall be obligatory upon the United States."

The convention we have already shown accepted all the propositions submitted to it, and thus perfected the stipulation between the State and Federal Governments.

It is then considered clear that the "navigable waters" of this State have been dedicated to the common use of the people of the United States; but perhaps it may be considered as questionable what extent of soil is embraced by the dedication.

We think it must be so much ground as is covered with the water, not only at low but at high tide. The government surveys extend thus far, and the shore is regarded rather as a part of the water than of the land. It is believed that there is no instance in which the United States, after having sold the land to high water, has afterwards asserted a right to dispose of the space intervening between that and low water mark.

There is another view which may be taken of the act of 1824,

going very satisfactorily to shew that, that act does not rest in the plaintiffs the title they assert.

By the first section of the act "to enable the people of the Alabama territory to form a constitution, &c." it is enacted "That the inhabitants of the territory of Alabama, be, and they are hereby authorised to form for themselves a constitution and state government, and to assume such name as they may deem proper; and that the said territory when formed into a state, shall be admitted into the Union, upon the same footing with the original states, in all respects whatever.—(Introduction to Aiken's Dig. XXV.)

There is no reservation by the United States of a property in the navigable waters of this state, or of the soil covered by them further than we have already seen; and in order to ascertain their rights over the subject, it may be well to inquire what rights are conceded to them in the "original states."

The original states, we are to understand, to be those which united in forming the Federal constitution. These states held their territorial rights from the British crown. The King, in virtue of his prerogative, was authorised to create a political power in all the countries newly discovered and possessed by his subjects.—(Campbell *vs.* Hall, 1 Comp. Rep. 204.)

The royal charters invested the colonies with a political character, by which they succeeded to all the territorial interests which had previously belonged to the sovereign power of the parent country. These charters created governments, and were not construed as other grants from the crown were. That is, they did not exclude, but actually included arms of the sea, &c."

The colonial governments thus had ample authority to alter the established laws with regard to their tide waters; so that the exclusive control of the subject was vested in them.—(Commonwealth *vs.* The inhabitants of Charlestown. 1 Pick Rep. 180—Angell on Tide waters, 37 to 60.)

The right of property in the navigable waters conferred upon the colonies by the royal charters, have never been relinquished to the United States.

True, the power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes, invests Congress with the right of empire and jurisdiction over the navigable waters of the country, so far as the exercise of this constitutional power may render it necessary. But the right of property which was given to the "Original States" by the King of Great Britain when they were colonies is still retained and can only be interfered with by the Federal Government, to preserve a free navigation.

The United States then may be said to claim for the public an easement for the transportation of merchandize, &c., in the navigable waters of the "Original States" while the right of property remains in the States.

The "Original States" possessing this interest in the waters within their jurisdictional limits, the new States cannot stand upon an equal footing with them as members of the Union, if the United States still retain over their navigable waters any other right than is necessary to the exercise of its constitutional powers.

In New Orleans *vs.* The United States, (10 Peters' Rep. 736) the court were of opinion that tho' the property in dispute was dedicated to the public use, so that the King had not the power rightfully to alien it, yet he had a limited power over it for certain purposes. But they say the treaty by which Louisiana was ceded to the United States could not, and the constitution did not transfer to the Federal Government the right to exercise the power which previous to the treaty was vested in the King.

"Special provision," say the court, is made in the constitution for the cession of jurisdiction from the States over places where the Federal Government shall establish forts, or other military works; and it is only in these places, or in the territories of the United States, where it can exercise a general jurisdiction.

The State of Louisiana was admitted into the Union on the same footing as the original States: her rights of sovereignty are the same; and, by consequence, no jurisdiction of the federal government, either for purposes of police or otherwise, can be exercised over this public ground which is not common to the United States. It belongs to the local authority to enforce the trust, and prevent what they shall deem a violation of it by the city authorities.

"All powers which properly appertain to sovereignty, which have not been delegated to the federal government, belong to the people."

Here, we think, is a clear concession that the rights of sovereignty of the new are quite as extensive as those possessed by the original States, and that the powers pertaining to sovereignty, which have not been delegated, belong to the States or the people.

The Constitution does not, in express terms, delegate an interest in the navigable waters of the States to the federal government. And, as the power to regulate commerce by implication gives only an easement, it will follow that the right of property belongs to the States.

Further: the act of 1819 submits to the convention several propositions for their acceptance or rejection, which are intended to operate, when accepted, as reservations in favor of the federal government. None of these propositions reserve a right of property in the navigable waters; this right must then be understood to have been yielded to the State upon the maxim of *expressio unius, exclusio est altereus.*

To recapitulate, we are of opinion:

First. That the "navigable waters" within this State have been dedicated to the use of the citizens of the United States, so that it is not competent for Congress to grant a right of property in the same.

Second. The navigable waters extend not only to low water, but embrace all the soil that is within the limits of high water mark.

Third. By the acts of Congress regulating the survey and disposal of the public lands, the Federal Government has renounced the title to the navigable waters and the soil covered by them; consequently, the plaintiffs can't recover on the ground of a dedication to the uses of the city under the act of 1818, which is an enactment of a later date.

Fourth. The original States, in virtue of their royal charters, are entitled to the right of property in the navigable waters within their territory, while the public are only entitled to an easement, to be provided for under that provision of the federal Constitution which authorises Congress to regulate commerce, &c. Alabama is admitted into the Union on an equal footing with the original States; and, of consequence, is entitled to the right of property in the tide waters within its limits.

Fifth. By the admission of Alabama into the Union, without a reservation of the right of property in the navigable waters, the State succeeded to all the right of the United States, except so far as it was reserved by the federal Constitution in some of its grants, or its retention was necessary to enable the Federal Government to exercise its delegated powers.

Having attained these conclusions, it will follow that the act of 1824 is inoperative, and confers no title upon the plaintiffs.

It is then unnecessary to examine the questions of law raised upon the bill of exceptions, inasmuch as the plaintiffs showed no right to recover; it is clear that they were not prejudiced by the several decisions of the circuit judge adverse to their pretensions.

Many other interesting questions were discussed at the bar, which (as they are not material to a decision of the case) we will decline considering.

The judgment of the circuit court is affirmed.

COLLIER.

A copy.—Test: JAS. B. WALLACE,
Clerk of the Sup. Ct. of the State of Ala.